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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1910.

No. [illegible]580

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRITZ AUGUSTUS HEINZE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 4, 1911.

(21922)

SUPREME COURT OF THE UNITED STATES.

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vs.

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17293—09——1

1 *Petition for writ of error.*

United States Circuit Court for the Southern District of New York in the Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF,
plaintiff in error,
v.
FRITZ AUGUSTUS HEINZE, DEFENDANT.

Now comes the United States of America by its attorney, Henry A. Wise, and complains that in the record and proceedings had in this cause and in the judgment sustaining the defendant's demurrer to the counts 1 to 15, inclusive, of the indictment herein, and dismissing said counts 1 to 15, inclusive, of said indictment, manifest error hath happened as will appear in the assignment of errors herewith submitted.

Wherefore the United States of America prays for the allowance of a writ of error and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated New York, Sept. 27, 1909.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York, Attorney for Petitioner.

(Endorsed:) U. S. Circuit Court for the Second Circuit. United States of America, plaintiff in error, vs. Fritz Augustus Heinze, defendant in error. Petition. Henry A. Wise, United States attorney, attorney for U. S. Service of a copy of the within is hereby admitted. Tomlinson, Tompkins & Tomlinson, attys. for F. A. Heinze, deft. U. S. Circuit Court, Southern District N. Y. Filed Oct. 2, 1909, John A. Shields, clerk.

2 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Circuit Court of the United States for the Southern District of New York in the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of the United States for the Second Circuit in the Southern District of New York, before you or some of you, between the United States of America and Fritz Augustus Heinze, a manifest error hath happened to the great damage of the said United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court

of the United States, together with this writ so that you have the same in the said Supreme Court at Washington within thirty days of the date hereof; that the record and proceedings aforesaid being accepted, the said Supreme Court may cause further to be done therein
3 to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the second day of October in the year of our Lord one thousand nine hundred and nine.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

Allowed by:

E. HENRY LACOMBE,
United States Circuit Court Judge for the Second Circuit.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to fifty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of United States of America, plaintiff in error, vs. Fritz Augustus Heinze, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 11th day of November in the year of our Lord one thousand nine hundred and nine and of the independence of the United States the one hundred and thirty-fourth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

4 (Indorsed:) Form No. 336. U. S. Circuit Court for the Second Circuit, Southern District of New York. United States of America versus Fritz Augustus Heinze. Writ of error. Henry A Wise, United States Attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, Oct. 5th, 1909. Tomlinson, Tompkins & Tomlinson, attorneys for deft.

5 **In the Circuit Court of the United States of America for the Southern District of New York, of the March term, in the year nineteen hundred and nine.**

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America, empaneled and sworn in the Circuit Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath, present that on the 14th day of March, A. D. 1907, at the said

Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States. That he, the said Fitz Augustus Heinze, so being president of said national banking association, as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 14th day of March, A. D. 1907, then and there, at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use,
benefit, and advantage of the said Fritz Augustus Heinze and
6 other persons to the grand jurors aforesaid unknown, misapply
certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of one hundred thousand ($100,000) dollars, and of the value of one hundred thousand ($100,000) dollars, in the manner and by the means following, that is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the said 14th day of March, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the 14th day of March, A. D. 1907, and for the sum of one hundred thousand ($100,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of one hundred thousand ($100,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association, as aforesaid in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, one hundred thousand ($100,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

7 *Second count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 14th day of March, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 14th day of March, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of fifty thousand ($50,000) dollars, and of the value of fifty thousand ($50,000) dollars, in the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of
8 said national banking association, did on the said 14th day of March, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount with the moneys,

funds, and credits of said national banking association a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the 14th day of March, A. D. 1907, and for the sum of fifty thousand ($50,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of fifty thousand ($50,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, fifty thousand ($50,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

9 *Third count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the 15th day of August, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management, which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 15th day of August, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking

association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of one hundred and ten thousand ($110,000) dollars, and of the value of one hundred and ten thousand ($110,000) dollars, in the manner and by the means following:

10 That is to say that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the said 15th day of August, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount with the moneys, funds, and credits of said national banking association a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the 15th day of August, A. D. 1907, and for the sum of one hundred and ten thousand ($110,000) dollars due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of one hundred and ten ($110,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, one hundred and ten thousand ($110,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

11 *Fourth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 16th day of August, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said

national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 16th day of August, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of one hundred and thirty-five thousand ($135,000) dollars, and of the value of one hundred and thirty-five thousand ($135,000) dollars, in
12 the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the said 16th day of August, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount with the moneys, funds, and credits of said national banking association a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto C. Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the 16th day of August, A. D. 1907, and for the sum of one hundred and thirty-five thousand ($135,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of one hundred and thirty-five thousand ($135,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national bank association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, one hundred and thirty-

five thousand ($135,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

13 *Fifth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the 28th day of August, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 28th day of August, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of two hundred and sixteen ($216,000) thousand dollars, and of the value of two hundred and sixteen thousand ($216,000) dollars, in the manner and by the means fol-

14 lowing: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the said 28th day of August, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount with the moneys, funds, and credits of said national banking association a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the

28th day of August, A. D. 1907, and for the sum of two hundred and sixteen ($216,000) thousand dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of two hundred and sixteen thousand ($216,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, two hundred and sixteen thousand ($216,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

15 *Sixth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 28th day of August, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 28th day of August, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply

certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of thirty thousand ($30,000) dollars, and of the value of thirty thousand ($30,000) dollars, in the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national
16 banking association, did, on the said 28th day of August, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount with the moneys, funds, and credits of said national banking association a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the 28th day of August, A. D. 1907, and for the sum of thirty thousand ($30,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of thirty thousand ($30,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, thirty thousand ($30,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

17 *Seventh count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 10th day of October, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association

as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 10th day of October, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of thirty thousand ($30,000) dollars, and of the value of thirty thousand ($30,000) dollars, in the manner and by the means following: That is to say, that he, the said
18 Fritz Augustus Heinze, as president as aforesaid of said national banking association, did, on the said 10th day of October, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the 10th day of October, A. D. 1907, and for the sum of thirty thousand ($30,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of thirty thousand ($30,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, thirty thousand ($30,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

19 *Eighth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 11th day of October, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York; which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 11th day of October, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of twenty thousand ($20,000) dollars, and of the value of twenty thousand ($20,000) dollars, in the manner and by the means following: That is to say,

20 that he, the said Fritz Augustus Heinze, as president as afore-
20 said of said national banking association, did, on the said 11th day of October, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto Heinze & Co., which said note was signed with the firm name of Otto Heinze & Co., and dated on the 11th day of October, A. D. 1907, and for the sum of twenty thousand ($20,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note when so received and discounted as aforesaid was not then and there well secured, and in fact not secured at all; which fact he, the said Fritz Augustus Heinze, then and

there well knew, and which said amount of twenty thousand ($20,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, twenty thousand ($20,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

21 *Ninth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 27th day of August, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 27th day of August, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of twenty thousand ($20,000) dollars, and of the value of twenty thousand ($20,000) dollars, in the manner and by the means following: That is to say, that he, the said

22 Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the said 27th day of August, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers

other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by Alice H. Watjen, and dated on the 27th day of August, A. D. 1907, and for the sum of twenty thousand ($20,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of twenty thousand ($20,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, twenty thousand ($20,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

23 *Tenth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 10th day of September, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 10th day of September, A. D. 1907, then and there at the said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the

said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of thirty thousand ($30,000) dollars, and of the value of thirty thousand ($30,000) dollars, in the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze, as president as afore-
24 said of said national banking association, did, on the said 10th day of September, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by George Baglin, and dated on the 10th day of September, A. D. 1907, and for the sum of thirty thousand ($30,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of thirty thousand ($30,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, thirty thousand ($30,000) dollars of the said moneys, funds, and credits of said national banding association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

25 *Eleventh count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 19th day of September, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus

Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 19th day of September, A. D. 1907, then and there at the said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of thirty thousand ($30,000) dollars, and of the value of thirty thousand ($30,000) dollars, in the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national
26 banking association, did on the said 19th day of September, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association a certain promissory note made and drawn by George Baglin, and dated on the 19th day of September, A. D. 1907, and for the sum of thirty thousand ($30,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of thirty thousand ($30,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, thirty thousand ($30,000) dollars of the said moneys, funds, and credits of said national banking association wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

27 *Twelfth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 10th day of August, A. D. 1907, at the said southern district of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management, which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 10th day of August, A. D. 1907, then and there at the said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors, and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of one hundred and ten thousand ($110,000) dollars, and of the value of one hundred and ten thousand ($110,000) dollars, in the manner and by the means following:

28 That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the said 10th day of August, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by Arthur P. Heinze, and dated on the 10th day of August, A. D. 1907, and for the sum of one hundred and ten thousand ($110,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of one hundred and ten thousand ($110,000) dollars, it being the proceeds of the discount of

said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, one hundred and ten thousand ($110,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

29 *Thirteenth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 24th day of June, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 24th day of June, A. D. 1907, then and there at the said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of two hundred thousand ($200,000) dollars, and of the value of two hundred thousand ($200,000) dollars, in the manner and by the means fol-
30 lowing: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the said 24th day of June, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said

national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by James S. Primrose and Arthur Braun, partners doing business under the firm name of Primrose & Braun, which said note was signed with the firm name of Primrose & Braun, and dated on the 24th day of June, A. D. 1907, and for the sum of two hundred ($200,000) thousand dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of two hundred thousand ($200,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, two hundred thousand ($200,000) dollars of the said moneys, funds, and credits of said national banking association wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

31 *Fourteenth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 17th day of September, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York; which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 17th day of September, A. D. 1907, then and there at the said city of New York and county of New York and district aforesaid, did willfully, wrongfully, un-

lawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of fifty thousand
32 ($50,000) dollars, and of the value of fifty thousand ($50,000) dollars, in the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did, on the 17th day of September, A. D. 1907, willfully, wrongfully, and unlawfully and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors unknown, then and there receive and discount with the moneys, funds, and credits of said national banking association a certain promissory note, made and drawn by one W. McM. White, whose full name is to the grand jurors unknown, dated on the 17th day of September, A. D. 1907, for the sum of fifty-one thousand ($51,000) dollars, due and payable on the 17th day of January, A. D. 1908, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of fifty thousand ($50,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, fifty thousand ($50,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

33 *Fifteenth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 5th day of August, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized,

and established, and was then existing and doing business in the city of New York and county of New York in the district aforesaid under the laws of the United States. That the said Fritz Augustus Heinze so being president of said national banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association, and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 5th day of August, A. D. 1907, then and there at said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit,

the sum of six hundred thousand ($600,000) dollars, and of the

34 value of six hundred thousand ($600,000) dollars, in the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze, as president as aforesaid of said national banking association, did on the 5th day of August, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount, with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by Frederick Eckstein, and dated on the 5th day of August, A. D. 1907, and for the sum of six hundred thousand ($600,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured, and in fact not secured at all, which fact he, the said Fritz Augustus Heinze, then and there well knew, and which said amount of six hundred thousand ($600,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that he, the said Fritz Augustus Heinze as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, six hundred thousand ($600,000) dollars of the said moneys, funds, and credits of said national banking association, wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

35 *Sixteenth count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the 14th day of October, A. D. 1907, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said national banking association had been theretofore created, organized, and established, and was then existing and doing business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States. That he, the said Fritz Augustus Heinze, so being president of said national banking association as aforesaid and by virtue of the official relation of said Fritz Augustus Heinze as president of said national banking association and by virtue of the power of control, direction, and management which said Fritz Augustus Heinze as such president of said national banking association possessed over the moneys, funds, and credits of said national banking association, on the said 14th day of October, A. D. 1907, then and there at the said city of New York and county of New York and district aforesaid, did willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of five hundred thousand ($500,000) dollars, in the manner and by the means following: That is to say, that he, the said Fritz Augustus Heinze,

36 as president as aforesaid of said national banking association did, on the said 14th day of October, A. D. 1907, willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown, then and there receive and discount with the moneys, funds, and credits of said national banking association, a certain promissory note made and drawn by him, the said Fritz Augustus Heinze, dated on the 14th day of October, A. D. 1907, for the sum of five hundred thousand ($500,000) dollars, due and payable on demand, a more particular description of which said note is to the grand jurors aforesaid unknown, and which said promissory note, when so received and discounted as aforesaid, was not then and there well secured and in fact not secured at all, and he, the said Fritz Augustus Heinze, then and there well knew at the time that he was not able to pay the same, he then and there being wholly insolvent, as he, the said Fritz Augustus Heinze, then and there well knew, and

which said sum of five hundred thousand ($500,000) dollars, it being the proceeds of the discount of said note aforesaid, was wholly lost to the said national banking association.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that he, the said Fritz Augustus Heinze, as such president of said national banking association as aforesaid, in manner and form and by the means and for the use and benefit and with the intent and without the knowledge and consent aforesaid, five hundred thousand ($500,000) dollars of the said moneys, funds, and credits of said national banking association wrongfully and unlawfully did then and there willfully misapply, contrary to the form of the statute in such case made and provided, against the peace and dignity of the United States of America.

HENRY A. WISE,
United States Attorney,
For the Southern District of New York.

37 (Endorsed:) U. S. Circuit Court, So. Dist. of New York. The United States of America vs. Fritz Augustus Heinze. Indictment. U. S. Rev. St. sec. 5209. Henry A. Wise, U. S. attorney. A true bill. George E. Wood, foreman. U. S. Circuit Court, Southern District N. Y. Filed May 11, 1909. John A. Shields, clerk. 1909, May 14, deft. pleads not guilty, with leave to withdraw within one week.

May 21. Filed demurrer.

Sept. 11, filed opinion, Hough, D. J. Demurrer sustained as to counts 1–15. Overruled as to count 16.

Sept. 21, filed order on above.

Sept. 22, deft. pleads not guilty.

38 Circuit Court of the United States of America for the Southern District of New York.

UNITED STATES
v.
FRITZ AUGUSTUS HEINZE.

And now comes Fritz Augustus Heinze, the defendant above named, in his own proper person in the court, and, having heard the said indictment read, says that the said indictment and each and every count thereof and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law and that he, the said Fritz Augustus Heinze, is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said Fritz Augustus Heinze prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

And, for further causes of demurrer to the said indictment, the said Fritz Augustus Heinze shows to the court here the following, that is to say:

First. That each of the separate counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz
39 Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that all of the allegations contained in each, every, and all of the aforesaid counts thereof is insufficient to charge any offense by the said defendant, Fritz Augustus Heinze, against the laws or statutes therein pleaded or otherwise, and are not sufficient to constitute a crime as against the said defendant, Fritz Augustus Heinze.

Second. That each of the separate counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each, every, and all of the said counts, separately and severally, for the reason that each and every of the counts thereof do not allege the offenses therein and thereby intended to be alleged and charged in words which of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense or offenses intended to be punished.

40 Third. That each of the separate counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each, every, and all of said counts, separately and severally, for the reason that each and every of the said counts do not apprise the defendant with reasonable certainty of the precise nature of the accusation against him and with a certainty sufficient to allow him to prepare his defense and to plead the judgment as a bar to any subsequent prosecution for the same offense.

Fourth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that each and every of the said counts fails to specify or allege the nature or kind or amount or value, respectively, of the moneys, funds, and credits of the said banking association alleged to have been misapplied by the defendant.

Fifth. That each of the said counts in said indictment num-
41 bered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said de-

fendant, Fritz Augustus Heinze, demurs to each and every of the said counts, separately and severally, for the reason that it does not appear and is nowhere alleged in any of said counts, respectively, the amount of money and the kind, character, and amount of funds and credits, respectively, which were paid out, assigned, utilized, or withdrawn from the said banking association on the alleged discount of the note in each count mentioned.

Sixth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that the statement in each of said counts that the defendant did discount the notes therein mentioned with the moneys, funds, and credits of the said national banking association is meaningless, and each of said counts is bad for repugnacy in that the said notes could not have been discounted in moneys, funds, and credits.

Seventh. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that the statement in each of said counts that the defend-

ant did discount the note therein mentioned with the moneys,

42 funds, and credits of the said national banking association is repugnant to the later allegation in each of said counts respectively to the effect that the amount of the note in each count separately mentioned, in dollars, was the proceeds of the discount of the said note in each count mentioned and that this amount, in dollars, was wholly lost to the said national banking association, and each of said counts is bad for repugnacy.

Eighth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of the said counts, separately and severally, for the reason that while in each and every of the said counts it is alleged that the discount of each of the notes in the said several counts separately mentioned was done with the intent to injure and defraud the said national banking association and divers other persons, it is not stated who the other persons were the defendant thus intended to injure and defraud.

Ninth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of the said counts, separately and severally, for the reason that while each of the said counts alleges that the defendant did discount the note in each of the said counts separately

mentioned with intent to injure and defraud the said national banking association and divers other persons, each and every of the said counts fails to specify or allege in what way or how it was the
43 intention of the defendant to injure and defraud the other persons therein referred to.

Tenth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that each and every of said counts, while alleging that the said defendant did wilfully, wrongfully, and unlawfully misapply the moneys, funds, and credits of the said national banking association in the sum of and of the value in each count separately mentioned for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons, fails to specify or allege how or what way the alleged misapplication or discount in each count separately mentioned was for the use or benefit or advantage of the said Fritz Augustus Heinze.

Eleventh. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that each and every of said counts, while alleging that the said defendant did wilfully, wrongfully, and unlawfully misapply the moneys, funds, and credits of the said national banking association in the sum of and of the value in each count separately mentioned for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons, fails to specify or allege who the other persons other than the said Fritz Augustus Heinze were for whose use, benefit, and advantage the said misapplication and discount was made.

44 Twelfth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of the said counts, separately and severally, for the reason that each and every of said counts, while alleging that the said defendant did wilfully, wrongfully, and unlawfully misapply the moneys, funds, and credits of the said national banking association in the sum of and of the value in each count separately mentioned for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons, fails to specify or allege how or in what way the alleged misapplication or discount in each count separately mentioned was for the use, benefit, and advantage of the persons other than the said Fritz Augustus Heinze in each of said counts referred to.

Thirteenth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of the said counts, separately and severally, for the reason that each and every of said counts, while alleging that the said defendant did wilfully, wrongfully, and unlawfully misapply the moneys, funds, and credits of the said national banking association in the sum of and of the value in each count separately mentioned for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons, fails to specify or allege how or in what way the alleged misapplication or discount in each count separately mentioned was for the joint or combined use, benefit, and advantage of the said Fritz Augustus Heinze and said other persons.

Fourteenth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that each and every of said counts, while alleging that the proceeds of the discount of each of said notes in each of said counts mentioned was wholly lost to the said national banking association, fails to specify or allege how or in what way the same was wholly lost to the said national banking association, and each and every of said counts is void for uncertainty and ambiguity.

Fifteenth. That each of the said counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, inclusively, is insufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that the statement that the moneys, funds, and credits of the said national banking association to the amount and of the value of the note in each count referred to, or that the proceeds of the said discount in each count mentioned, in dollars, to the amount of each of the said notes respectively, was wholly lost to the said national banking association appears on the face of each of said counts to be the mere conclusion of the pleader and not only to be in no way warranted by the facts alleged, but to be absolutely contradicted by the facts in each count set forth, as in each of said counts it is nowhere alleged that the makers of said notes were not legally bound to pay the same or were not and are not amply able to pay the same or have not, in fact, paid the same; and it further appears that each and every of said notes in said counts mentioned were, by the terms thereof, only due and payable on demand of the said national banking association and each of said counts fails to allege, if said notes have not in fact been paid, that any demand has been made for the payment thereof.

Sixteenth. That each of the separate counts in said indict-
46 ment numbered eleventh, twelfth, and thirteenth, inclusively, is insufficient in law and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that each of said counts fails to specify how or by what the note in each count referred to was secured and, if secured, the value of the security either at the time the said loan was made or at the present time, and that the statement in each of said counts contained that the said note was not then and there well secured is not a statement of any fact, but the mere conclusion of the pleader, and each of said counts is void for uncertainty and ambiguity.

Seventeenth. That each of the separate counts in said indictment numbered first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth, inclusively, is sufficient in law, and the said Fritz Augustus Heinze demurs to each and every of said counts, separately and severally, for the reason that the facts set out in each of said counts, separately and severally, merely show that loans or discounts, in the due and ordinary course of business, were made by the said Fritz Augustus Heinze as president and on behalf of the said national banking association.

And this defendant prays that each of the said specifications hereinbefore set forth may be taken as if separately made under the said respective demurrers to each of the several respective counts in the said indictment and to the demurrer to the indictment as a whole, the same as if repeated as many times as would be required to make each of said specifications apply to said indictment as a whole and separately to each of the separate counts thereof.

TOMLINSON, TOMPKINS & TOMLINSON,
Attorneys for the defendant, Fritz Augustus Heinze.

Office and post-office address, 15 Broad street, Borough of Manhattan, city of New York.

47 We hereby certify that in our opinion the foregoing demurrer is well founded in law.

EDWARD LAUTERBACH,
JOHN C. TOMLINSON,
Counsel for Defendant.

(Endorsed:) Circuit Court of the United States of America for the Southern District of New York. United States vs. Fritz Augustus Heinze. Demurrer to indictment. Tomlinson, Tompkins & Tomlinson, attorneys for defendant, 35 Wall street, New York City, New York. U. S. Circuit Court, Southern District of N. Y. Filed May 21, 1909. John A. Shields, clerk.

48 U. S. Circuit Court, Southern District N. Y.

UNITED STATES *vs.* F. A. HEINZE. } Demurrer to indictment. Heard Sept. 3, 1909.

Memorandum.

With respect to indictment for misapplication, under sec. 5209, I have expressed fully my views in the Morse case, 161 F. R., 429, on the first indictment against this defendant, 161 F. R. 425. The present discussion has not rendered it necessary (so far as I can see) to say much more.

This indictment seems to me to charge, in counts 1–15, this and no more, viz, that with intent to defraud the bank of which he was president, and for the benefit of himself and others unnamed, defendant caused the bank to discount single name commercial paper, and the bank lost the amount paid on the discount. The sixteenth count varies from the others only in stating that the person responsible on the discounted rate was insolvent to the knowledge of defendant at the time of discount.

The crime of which defendant is guilty, if guilty at all, is "wilful misapplication." The one characteristic, or essential of this crime, on which the Supreme Court has always insisted, is conversion; no method of being guilty without converting the money, funds, or credits of the bank has been pointed out. This word conversion has supplied the legal measure, which the court has not been
49 able to find in "willful misapplication." If the facts stated in an indictment do not set forth a case of conversion, the indictment is bad, and a general allegation of wrongful intent will not cure it. Taking the first count for example, could the bank have maintained an action for conversion against the recipient of the discount proceeds under the facts stated?

I think not, and am therefore of opinion that counts 1–15 are demurrable.

The sixteenth count is also asserted to be bad, under the Button decision in 108 U. S., 193, but this was explained in the Fish case, 24 F. R., 585, in the manner I have tried to summarize on p. 433 of 161 F. R. Does this count sufficiently charge that the discount was originally procured by fraudulent means? And does or can it amount to a conversion, for a bank president, for his own benefit, to discount the note of a known insolvent? It appears to me that both questions should be answered affirmatively and the demurrer to the 16th count overruled.

It is much to be hoped that this decision will be reviewed; anything more unsatisfactory than the ruling cases on "willful misapplication" I have rarely met.

Sept. 10th, 1909.

C. M. HOUGH, *D. J.*

50 At a stated term of the United States Circuit Court for the Southern District of New York, held at the United States court-house, in the post-office building, in the borough of Manhattan, city of New York, Southern District of New York, on the 21st day of September, 1909.

Present: Hon. Charles M. Hough, United States district judge.

UNITED STATES OF AMERICA
against
FRITZ AUGUSTUS HEINZE.

The defendant, having on the 3rd day of August, 1909, filed his demurrer herein to the indictment filed on the 11th day of May, 1909, herein, and the United States district attorney having thereupon moved the said cause for argument upon the issues of law raised by said demurrer, and said argument having duly come on to be heard before the undersigned, United States district judge for the Southern District of New York, on the 3rd day of September, 1909, and argument having been had thereon, and after hearing John C. Tomlinson, esq., in support of said demurrer, and Henry A. Wise, esq., United States attorney, in opposition thereto, and the undersigned having, on the 11th day of September, 1909, filed an opinion herein sustaining said demurrer to counts 1 to 15, inclusive, in said indictment and overruling the demurrer to the sixteenth count thereof,

Now, upon motion of Tomlinson, Tompkins & Tomlinson, esqs., attorneys for the defendant, Fritz Augustus Heinze, it is

Ordered and adjudged that the said demurrer to counts 1 to
51 15, inclusive, in said indictment be, and the same hereby is, sustained and the defendant, Fritz Augustus Heinze, is not required to answer the same; and upon motion of Henry A. Wise, esq., United States attorney, it is

Ordered that the said demurrer to the sixteenth count of said indictment be, and the same is hereby, in all respects, overruled, and it is

Further ordered that the defendant be, and he hereby is, required to appear and plead to the sixteenth count of said indictment on the 22nd day of September, 1909.

C. M. HOUGH,
United States District Judge, holding a Circuit Court.

Notice of settlement waived.
N. Y., Sept. 21/09.

HENRY A. WISE,
U. S. Attorney.

(Endorsed:) United States Circuit Court, Southern District of New York. The United States of America against Fritz Augustus Heinze. Order. Tomlinson, Tompkins & Tomlinson, attorneys for Fritz Augustus Heinze, 35 Wall st., New York City, New York. U. S. Circuit Court, Southern District N. Y. Filed Sep. 21, 1909. John A. Shields, clerk.

52 United States Circuit Court for the Southern District of New York in the Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF,
PLAINTIFF IN ERROR,
v.
FRITZ AUGUSTUS HEINZE, DEFENDANT.

Assignment of errors.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred in the decision of the court herein sustaining the demurrer to counts 1 to 15, inclusive, of the indictment herein:

I. The court erred in sustaining the demurrer to counts 1 to 15, inclusive, of the indictment herein.

II. The court erred in not overruling the demurrer to counts 1 to 15, inclusive, of the indictment herein.

III. The court erred in holding as matter of law that counts 1 to 15, inclusive, of the indictment herein were insufficient in law.

IV. The court erred in holding in reference to counts 1 to 15,
53 inclusive, of the indictment herein that it was necessary to set forth all of the facts incident to a misapplication of national bank funds in order to show that there was a misapplication of such funds.

And the United States aforesaid, plaintiff in error, prays that the order entered herein sustaining the demurrer to the said counts 1 to 15, inclusive, of the indictment herein for the errors aforesaid and other errors in the record and proceedings herein, may be reversed and altogether held for nothing and that the plaintiff in error may be restored to all things which it has lost by reason of said order, and that the Circuit Court of the United States for the Southern District of New York be directed to vacate and set aside said order and to compel the defendant, the defendant in error, to plead to the indictment herein.

Dated New York, September 27, 1909.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York,
Attorney for Plaintiff in Error.

(Endorsed:) U. S. Circuit Court for the Second Circuit. United States of America, plaintiff, plaintiff in error, vs. Fritz Augustus Heinze, defendant, defendant in error. Assignment of errors. Henry A. Wise, United States attorney, attorney for U. S. U. S. Circuit Court, Southern District N. Y. Filed Oct. 2, 1909. John A. Shields, clerk.

17293—09——3

54 *By the Honorable E. Henry Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Fritz Augustus Heinze, greeting:*

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden in the city of Washington, in the District of Columbia, on the 29th day of October, 1909, pursuant to an order filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the U. S. is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said order mention should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 2nd day of October, in the year of our Lord one thousand nine hundred and nine, and of the independence of the United States the one hundred and thirty-fourth.

[SEAL.] E. HENRY LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

55 (Indorsed:) United States circuit court of appeals for the second circuit. United States of America, plaintiff, plaintiff in error, *vs.* Fritz Augustus Heinze, defendant. Citation. Service of a copy of the within citation is hereby admitted.

(Indorsement on cover:) File No. 21922. S. New York, C. C. U. S. Term No. 696. The United States, plaintiff in error, vs. Fritz Augustus Heinze. Filed December 3d, 1909. File No. 21922.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 671.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRITZ AUGUSTUS HEINZE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Petition for writ of error.*

United States Circuit Court, Southern District of New York, in the Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF, plaintiff in error,
v.
FRITZ AUGUSTUS HEINZE, DEFENDANT.

Now comes the United States of America by its attorney, Henry A. Wise, and complains that in the record and proceedings had in this cause and in the judgment sustaining the defendant's motion to quash counts 1, 2, 3, 4, 5, and 6 of the indictment found herein against said Fritz Augustus Heinze on March 3, 1910, and dismissing said counts of said indictment, manifest error hath happened, as will appear in the assignment of errors herewith submitted.

Wherefore the United States of America prays for the allowance of a writ of error and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated New York, May 23, 1910.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York,
Attorney for Petitioner.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed May 27, 1910. John A. Shields, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States of America and Fritz Augustus Heinze a manifest error hath happened, to the great damage of the said United States of America, as is said and appears by its complaint,

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf,

Do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same in the said Supreme Court in the city of Washington, District of Columbia, within thirty days from the date hereof, and that the record and proceedings aforesaid being inspected, the said

Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

3 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27 day of May, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the one hundred and thirty-fourth.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, For the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.

C. M. HOUGH,
U. S. District Judge holding a Circuit Court for the Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to fifty-seven, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, plaintiff in error, vs. Fritz Augustus Heinze, defendant in error, as the same remain of record and on file in said office.

4 In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 8th day of August, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the one hundred and thirty-fifth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

5 (Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. The United States of America v. Fritz Augustus Heinze. 2-390. E. & A. D. 3106. U. S. Circuit Court, Southern District N. Y. Filed May 28, 1910. John A. Shields, clerk. (Original.) Henry A. Wise, United States attorney, attorney for United States. Due service of a copy of the within is hereby admitted. Dated New York, May 27, 1910. Copy received. Levy, Rosenthal & Heermance. May 27, 1910. 2 Rector street, N. Y. Attorneys for F. A. Heinze.

6 In the Circuit Court of the United States of America for the Southern District of New York, Second Circuit. Of the January term in the year nineteen hundred and ten.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America, empaneled and sworn in the Circuit Court of the United States for the Southern

District of New York, and inquiring for that district, upon their oath present, that on the twenty-first day of June, in the year nineteen hundred and seven, at said Southern District of New York, one Fritz Augustus Heinze was the president of a certain national banking association, a body corporate, then and there known and designed as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said banking association had been theretofore created, organized, and established, and was then existing and doing a banking business in the city of New York and county of New York in the district aforesaid, under the laws of the United States; that he, said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said banking association, on said twenty-first
7 day of June, in the year nineteen hundred and seven, then and there, at said city of New York and county of New York and district aforesaid, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did willfully misapply certain of the moneys, funds, and credits of said banking association, then and there being to the amount and of the value of sixty thousand dollars ($60,000) by unlawfully, knowingly, fraudulently, and willfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons then and there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did then and there wilfully apply the said sum of sixty thousand dollars ($60,000) of the moneys, funds, and credits of said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made as aforesaid, was not then and there well secured, which fact he, the said Fritz Augustus Heinze, then and there well
8 knew, and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of sixty thousand dollars ($60,000), to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of sixty thousand

dollars ($60,000) then and there was wholly lost to the said banking association and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

COUNT 1A.

The grand jurors aforesaid, upon their oath aforesaid, further present that at all times from January first, nineteen hundred and three, to the eighteenth day of October, nineteen hundred and seven, the United Copper Company was a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with offices and a place of business in the city and county of New York, in the Southern District of New York, and having an authorized capital stock of the par value of eighty million dollars ($80,000,000), consisting of eight hundred thousand (800,000) shares, each of the par value of one hundred dollars ($100), of which said eighty million dollars ($80,000,000) of capital stock fifty million dollars ($50,000,000), consisting of five hundred thousand (500,000) shares of the par value of one hundred dollars ($100) each, had been issued as full paid and non-assessable, of which fifty thousand (50,000) shares consisted of preferred stock of the par value of five million dollars ($5,000,000) and four hundred and fifty thou-
9 sand (450,000) shares consisted of common stock of the par value of forty-five million dollars ($45,000,000), which said five hundred thousand (500,000) shares were held by divers persons whose names and the amount of whose respective holdings of said stock are too numerous to be here set forth; that at all such times the actual intrinsic value of such shares of common stock did not exceed the sum of twenty dollars ($20) each; that at all such times one Fritz Augustus Heinze, late of the city and county of New York and Southern District of New York, was the president and a director of the aforesaid United Copper Company and was the owner and holder of one hundred and twenty-five thousand (125,000) of the aforesaid four hundred and fifty thousand (450,000) shares of common stock of the aforesaid United Copper Company; that at all such times one Arthur P. Heinze, late of the city, county, and Southern District of New York, was the vice-president and a director of said United Copper Company and the owner and holder of a large number of the aforesaid four hundred and fifty thousand (450,000) shares of common stock of said United Copper Company, the exact number of such shares so owned and held by said Arthur P. Heinze being to the jurors unknown; that at all such times one Otto C. Heinze, late of the city, county, and Southern District of New York, was the owner and holder of a large number of the aforesaid four hundred and fifty thousand (450,000) shares of common stock of said United Copper Company, the exact number of such shares so owned and held by said Otto C. Heinze being to the jurors unknown; that at all such times one Max H. Schultze, late of the city, county, and Southern District

of New York, was the assistant secretary and a director of said United Copper Company, and the owner and holder of a large number
10 of the aforesaid four hundred and fifty thousand (450,000) shares of common stock of said United Copper Company, the exact number of such shares so owned and held by said Max H. Schultze being to the jurors unknown; that at all such times the aggregate of shares of common stock of said United Copper Company owned and held by the aforesaid Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze as aforesaid constituted and was a majority of the aforesaid four hundred and fifty thousand (450,000) shares of common stock of said United Copper Company; that at all such times said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, by virtue of their owning and holding the shares of common stock of said United Copper Company, as aforesaid, were able to and did dominate and control said United Copper Company and the management thereof, and each of them was at all such times fully acquainted with its affairs and had full knowledge of all of its assets and liabilities and the actual amount and intrinsic value thereof, and fully knew at all such times that the real intrinsic value of the aforesaid four hundred and fifty thousand (450,000) shares of common stock thereof did not at any time exceed the sum of twenty dollars ($20) each; that at all such times said Fritz Augustus Heinze, Arthur P. Heinze, and Otto C. Heinze were brothers; that at all times from March eighth, nineteen hundred and six, to October eighteenth, nineteen hundred and seven, the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were partners trading and doing business in the city, county, and Southern District of New York under the firm name and style of Otto Heinze & Co., and as such were engaged in the business of buying and selling corporate stocks for themselves and for and on account of customers, such purchases and sales for such customers being on commission; that at all
11 such times the aforesaid Arthur P. Heinze and the aforesaid Otto C. Heinze and the aforesaid Max H. Schultze, individually and jointly, were indebted to the aforesaid Fritz Augustus Heinze in large amounts of money, the exact amounts whereof are to the jurors unknown, but the aggregate whereof exceeded the sum of five hundred thousand dollars ($500,000); that at all such times shares of the aforesaid stock of the aforesaid United Copper Company were offered for sale and were bought and sold in the open market in the aforesaid city of New York and Southern District of New York; that at all times from January first, nineteen hundred and five, to October eighteenth, nineteen hundred and seven, the aforesaid Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were engaged in a scheme and plan to create a false and inflated value for the aforesaid shares of stock of the aforesaid United Copper Company, which was to be accomplished in the manner following, to wit:

By virtue of their control as aforesaid over the management of the aforesaid United Copper Company they, the said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze,

from time to time caused and procured said United Copper Company to declare and pay dividends upon its four hundred and fifty thousand (450,000) shares of common stock aforesaid, which said dividends were not paid from earnings of said United Copper Company, but were paid from the capital thereof as they the said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze well knew; and further by having divers stock brokers in the aforesaid city of New York and in the various markets in the United States, where shares of the aforesaid stock of said United Copper Company were bought and sold, from time to time and on fre-
12 quent occasions, sell in the open market, for the aforesaid Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, large amounts thereof, which they, the said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, would immediately cause to be bought for their account by the same or other stock brokers; that by the means aforesaid the said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze sought to deceive investors into believing that the intrinsic value of the aforesaid shares was far in excess of twenty dollars ($20) each, and that the price at which the same was being bought and sold was its real intrinsic value, and that thereby there would become a great demand for such shares and honest and innocent investors would be deceived and inveigled into buying and paying large sums of money for such shares, far in excess of the real intrinsic value thereof, and that they, the said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, by the deceit and fraud aforesaid so having caused a demand for such shares, might sell the shares of said stock owned and held by them as aforesaid at a price far in excess of the real intrinsic value thereof, and thereby reap large profits, which, among other things, would enable the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze to pay off their indebtedness aforesaid to said Fritz Augustus Heinze; that in the aforesaid fraudulent scheme and plan it was necessary for said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze to expend large sums of money in payment for such shares of stock so purchased as aforesaid, and for the payment of brokerage commissions on the purchase and sale of said shares as aforesaid; and for their expenses incidental thereto; that the
13 aforesaid scheme and plan was at all times a reckless, hazardous, and dangerous enterprise, which they, the aforesaid Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze well knew, and could not result otherwise than in a complete failure and total loss, except by said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze putting into said enterprise and expending therein large sums of money, far in excess of any moneys possessed by them, as they, the said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, well knew; that at all times from the first day of January, nineteen hundred and six, to the date of filing this indictment, the Mercantile National Bank, of the city of New York, was a banking association

which had theretofore been created, organized, and established, and was then existing and doing business as a banking association in the city of New York, county of New York, under and by virtue of the laws of the United States, that at all times from the ninth day of January to the eighteenth day of October, nineteen hundred and seven, the aforesaid Fritz Augustus Heinze was the president and a director of the aforesaid the Mercantile National Bank of the city of New York; that at all such times the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were stockholders and said Arthur P. Heinze and Max H. Schultze were directors of the aforesaid the Mercantile National Bank of the City of New York; that the aforesaid Fritz Augustus Heinze so being president of the aforesaid banking association, and by virtue of the official relation of said Fritz Augustus Heinze as president of said banking association, on the twenty-first day of June, in the year nineteen hundred and seven, at the city and county of New York, in the Southern District of New
14 York, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of sixty thousand dollars ($60,000) by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of the said Fritz Augustus Heinze and of certain other persons then and there doing business under the firm name and style of Otto Heinze & Co., as aforesaid, to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, in the aforesaid scheme and plan to manipulate stock of the aforesaid United Copper Company as aforesaid, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze as president of the said banking association then and there possessed over the money, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and, to the use as aforesaid, unlawfully, knowingly, and fraudulently did, on said twenty-first day of June, nineteen hundred and seven, wilfully apply the said sum of sixty thousand dollars ($60,000) of the moneys, funds, and credits of the said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made, as aforesaid, was not then and there well secured, which fact
he, the said Fritz Augustus Heinze, then and there well
15 knew, and thereupon, to wit, at the time and place as aforesaid, the said Fritz Augustus Heinze did cause the proceeds of the said loan, amounting to the said sum of sixty thousand dollars ($60,000) to be paid out of the moneys, funds, and credits of the said

banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, and the said Fritz Augustus Heinze, whereby the said sum of sixty thousand dollars ($60,000) then and there was wholly lost to said banking association and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

COUNT 2.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the sixteenth day of August, in the year nineteen hundred and seven, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said banking association had been theretofore created, organized and established, and was then existing and doing a banking business in the city of New York and county of New York in the district aforesaid, under the laws of the United States; that he, said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said banking association,

16 on said sixteenth day of August, in the year nineteen hundred and seven, then and there at said city of New York and county of New York and district aforesaid, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds and credits of said banking association then and there being to the amount and of the value of one hundred and thirty-five thousand dollars ($135,000) by unlawfully, knowingly, fraudulently and wilfully and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons then and there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control and direction which the said Fritz Augustus Heinze, as president of the said banking association then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use, as aforesaid, unlawfully, knowingly, and fraudulently did then and there wilfully apply the said sum of one hundred and thirty-five thousand dollars ($135,000) of the moneys, funds, and credits of said banking asso-

ciation to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made as aforesaid, was not then and there well secured, and in fact not secured at all, all of which facts he, the said Fritz Augustus
17 Heinze, then and there well knew, and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of one hundred and thirty-five thousand dollars ($135,000) to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of one hundred and thirty-five thousand dollars ($135,000) then and there was wholly lost to the said banking association and the moneys, funds, and credits of the same were and are depleted in that amount; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

Count 2A.

The grand jurors aforesaid, upon their oath aforesaid, further present that they here repeat and herein incorporate, as if here set forth in full, each, every, and all of the allegations of count 1A of this indictment, down to and including the clause "that at all such times the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were stockholders and said Arthur P. Heinze and Max H. Schultze were directors of the aforesaid The Mercantile National Bank of the City of New York;" in the paragraph of said count beginning "By virtue of their control as aforesaid over the management of the aforesaid United Copper Company."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the aforesaid Fritz Augustus Heinze so being president of the aforesaid banking association, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said bank-
ing association, on the sixteenth day of August, in the year
18 nineteen hundred and seven, at the city and county of New York, in the Southern District of New York, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of one hundred and thirty-five thousand dollars ($135,000) by unlawfully, knowingly, fraudulently, and wilfully and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of the said Fritz Augustus Heinze and of certain other persons then and there doing business under the firm name and style of Otto Heinze & Co., as aforesaid, to

wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, in the aforesaid scheme and plan to manipulate stock of the aforesaid United Copper Company as aforesaid, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did, on said sixteenth day of August, in the year nineteen hundred and seven, wilfully apply the said sum of one hundred and thirty-five thousand dollars ($135,000) of the moneys, funds, and credits of the said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C.
19 Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made, as aforesaid, was not then and there well secured, and in fact not secured at all, all of which said facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place as aforesaid, the said Fritz Augustus Heinze did cause the proceeds of the said loan, amounting to the said sum of one hundred and thirty-five thousand dollars ($135,000) to be paid out of the moneys, funds, and credits of the said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze and the said Fritz Augustus Heinze, whereby the said sum of one hundred and thirty-five thousand dollars ($135,000) then and there was wholly lost to said banking association, and the moneys, funds, and credits of the same were and are depleted in that amount; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

COUNT 3.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the twenty-eighth day of August, in the year nineteen hundred and seven, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said banking association had been theretofore created, organized, and established and was then exist-
20 ing and doing a banking business in the city of New York and county of New York in the district aforesaid, under the laws of the United States; that he, said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze, as presi-

dent of said banking association, on said twenty-eighth day of August, in the year nineteen hundred and seven, then and there at said city of New York and county of New York and district aforesaid, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of two hundred and sixteen thousand dollars ($216,000), by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons then and there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did then and there wilfully apply the said sum of two hundred and sixteen thou-
21 sand dollars ($216,000) of the moneys, funds, and credits of said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made, as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of two hundred and sixteen thousand dollars ($216,000), to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of two hundred and sixteen thousand dollars ($216,000) then and there was wholly lost to the said banking association and the moneys, funds, and credits of the same were and are depleted in that amount; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

COUNT 3A.

The grand jurors aforesaid, upon their oath aforesaid, further present that they here repeat and herein incorporate as if here set forth in full each, every, and all of the allegations of count 1A of this indictment, down to and including the clause "that at all such

times the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were stockholders and said Arthur P. Heinze and Max H. Schultze were directors of the aforesaid The Mercantile National Bank of the City of New York;" in the paragraph of said
22 count beginning "By virtue of their control as aforesaid over the management of the aforesaid United Copper Company."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the aforesaid Fritz Augustus Heinze, so being president of the aforesaid banking association, and by virtue of the official relation of said Fritz Augustus Heinze as president of said banking association, on the twenty-eighth day of August, in the year nineteen hundred and seven, at the city and county of New York, in the Southern District of New York, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association, then and there being to the amount and of the value of two hundred and sixteen thousand dollars ($216,000) by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of the said Fritz Augustus Heinze and of certain other persons then and there doing business under the firm name and style of Otto Heinze & Co., as aforesaid, to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, in the aforesaid scheme and plan to manipulate stock of the aforesaid United Copper Company as aforesaid, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and
23 credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did, on said twenty-eighth day of August, in the year nineteen hundred and seven, wilfully apply the said sum of two hundred and sixteen thousand dollars ($216,000) of the moneys, funds, and credits of the said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which said facts he, the said Fritz Augustus Heinze then and there well knew, and thereupon, to wit, at the time and place as aforesaid, the said Fritz Augustus Heinze did cause the proceeds of the said loan, amounting to the said sum of two hundred and sixteen thousand dollars ($216,000) to be paid out of the moneys, funds, and credits of the said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C.

Heinze, and Max H. Schultze, and the said Fritz Augustus Heinze, whereby the said sum of two hundred and sixteen thousand dollars ($216,000) then and there was wholly lost to said banking association and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

COUNT 4.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the twenty-eighth day of August, in the year nineteen hundred and seven, at the said Southern District of
24 New York, one Fritz Augustus Heinze was the president of a certain banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said banking association had been theretofore created, organized, and established, and was then existing and doing a banking business in the city of New York and county of New York in the district aforesaid, under the laws of the United States; that he, the said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze as president of said banking association, on said twenty-eighth day of August, in the year nineteen hundred and seven, then and there at said city of New York and county of New York and district aforesaid unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association, then and there being to the amount and of the value of thirty thousand dollars ($30,000), by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons then and there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control,
25 and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid and to the use as aforesaid, unlawfully, knowingly, and fraudulently did then and there wilfully apply the said sum of thirty thousand dollars ($30,000) of the moneys, funds, and credits of said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto

Heinze & Co., as aforesaid, and which said loan, when so made as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of thirty thousand dollars ($30,000), to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of thirty thousand dollars ($30,000) then and there was wholly lost to the said banking association and the moneys, funds, and credits of the same were and are depleted in that amount; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

COUNT 4A.

The grand jurors aforesaid, upon their oath aforesaid, further present that they here repeat and herein incorporate as if here set forth in full each, every, and all of the allegations of Count 1A
26 of this indictment, down to and including the clause "that at all such times the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were stockholders and said Arthur P. Heinze and Max H. Schultze were directors of the aforesaid The Mercantile National Bank of the City of New York;" in the paragraph of said count beginning "By virtue of their control as aforesaid over the management of the aforesaid United Copper Company."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the aforesaid Fritz Augustus Heinze, so being president of the aforesaid banking association, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said banking association, on the twenty-eighth day of August, in the year nineteen hundred and seven, at the city and county of New York, in the Southern District of New York, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers others persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association, then and there being to the amount and of the value of thirty thousand dollars ($30,000), by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit and advantage of the said Fritz Augustus Heinze and of certain other persons then and there doing business under the firm name and style of Otto Heinze & Co., as aforesaid, to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, in the aforesaid scheme and plan to manipulate stock of the aforesaid United Copper Company as aforesaid, which said conversion and application of the said moneys, funds,

27 and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did, on said twenty-eighth day of August, in the year nineteen hundred and seven, wilfully apply the said sum of thirty thousand dollars ($30,000) of the moneys, funds, and credits of the said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which said facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place as aforesaid, the said Fritz Augustus Heinze did cause the proceeds of the said loan, amounting to the said sum of thirty thousand dollars ($30,000) to be paid out of the moneys, funds, and credits of the said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, and the said Fritz Augustus Heinze, whereby the said sum of thirty thousand dollars ($30,000) then and there was wholly lost to said banking association and the moneys, funds, and credits of the same were and are depleted in that amount; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

28 COUNT 5.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the tenth day of October, in the year nineteen hundred and seven, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said banking association had been theretofore created, organized, and established, and was then existing and doing a banking business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States; that he, said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said banking association, on said tenth day of October, in the year nineteen hundred and seven, then and there at said city of New York and county of New York and district aforesaid, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other per-

sons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of thirty thousand dollars ($30,000) by unlawfully, knowingly, fraudulently, and wilfully and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons then and there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze,

29 which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did then and there wilfully apply the said sum of thirty thousand dollars ($30,000) of the moneys, funds, and credits of said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made, as aforesaid, was not then and there well secured and in fact not secured at all, all of which facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of thirty thousand dollars ($30,000), to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of thirty thousand dollars ($30,000) then and there was wholly lost to the said banking association and the moneys, funds, and credits of the same were and are depleted in that amount; against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

30 COUNT 5A.

The grand jurors aforesaid, upon their oath aforesaid, further present that they here repeat and herein incorporate, as if here set forth in full each, every, and all of the allegations of count 1A of this indictment, down to and including the clause "that at all such times the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were stockholders, and said Arthur P. Heinze and Max H. Schultze were directors of the aforesaid The Mercantile National Bank of the City of New York;" in the paragraph of said count beginning "By virtue of their control as aforesaid over the management of the aforesaid United Copper Company."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the aforesaid Fritz Augustus Heinze so being president of the aforesaid banking association, and by virtue of the official relation of said Fritz Augustus Heinze as president of said banking association on the tenth day of October, in the year nineteen hundred and seven, at the city and county of New York, in the Southern District of New York, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of thirty thousand dollars ($30,000) by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of the said Fritz Augustus Heinze and of certain other persons then and there doing business
31 under the firm name and style of Otto Heinze & Co., as aforesaid, to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, in the aforesaid scheme and plan to manipulate stock of the aforesaid United Copper Company as aforesaid, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze as president of the said banking association then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did on said tenth day of October, in the year nineteen hundred and seven, wilfully apply the said sum of thirty thousand dollars ($30,000) of the moneys, funds, and credits of the said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan when so made, as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which said facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place as aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of thirty thousand dollars ($30,000), to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, and the said Fritz Augustus Heinze, whereby the said sum of thirty thousand dollars ($30,000) then and there was wholly lost to said banking association and the moneys, funds, and credits of the same were
32 and are depleted in that amount; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

COUNT 6.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the eleventh day of October, in the year nineteen hundred and seven, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain banking association, a body corporate, then and there known and designated as the Mercantile National Bank of the City of New York, in the city of New York, in the county of New York, in the State of New York, which said banking association had been theretofore created, organized, and established, and was then existing and doing a banking business in the city of New York and county of New York, in the district aforesaid, under the laws of the United States; that he, said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said banking association, on said eleventh day of October, in the year nineteen hundred and seven, then and there at said city of New York and county of New York, and district aforesaid, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of twenty thousand dollars ($20,000) by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons then and
33 there doing business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did then and there wilfully apply the said sum of twenty thousand dollars ($20,000) of the moneys, funds, and credits of said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made, as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of twenty thousand dollars ($20,000), to be paid out of the moneys, funds, and credits of

said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of twenty thousand dollars ($20,000) then and there was wholly lost to the said banking association and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United
34 States and contrary to the form of the statute of the same in such case made and provided.

COUNT 6A.

The grand jurors aforesaid, upon their oath aforesaid, further present that they here repeat and herein incorporate as if here set forth in full each, every, and all of the allegations of count 1A of this indictment down to and including the clause "that at all such times the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were stockholders, and said Arthur P. Heinze and Max H. Schultze were directors of the aforesaid The Mercantile National Bank of the City of New York," in the paragraph of said count beginning "By virtue of their control as aforesaid over the management of the aforesaid United Copper Company."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the aforesaid Fritz Augustus Heinze so being president of the aforesaid banking association, and by virtue of the official relation of said Fritz Augustus Heinze as president of said banking association, on the eleventh day of October, in the year nineteen hundred and seven, at the city and county of New York, in the Southern District of New York, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of twenty thousand dollars ($20,000) by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of the said Fritz Au-
35 gustus Heinze and of certain other persons then and there doing business under the firm name and style of Otto Heinze & Co., as aforesaid, to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, in the aforesaid scheme and plan to manipulate stock of the aforesaid United Copper Company as aforesaid, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and, to the use as aforesaid, unlawfully, knowingly, and fraudulently did, on said eleventh day of October, in the

year nineteen hundred and seven, wilfully apply the said sum of twenty thousand dollars ($20,000) of the moneys, funds, and credits of the said banking association to the making of a certain demand loan for the said amount to said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, partners, doing business under the firm name of Otto Heinze & Co., as aforesaid, and which said loan, when so made, as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which said facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place as aforesaid, the said Fritz Augustus Heinze did cause the proceeds of the said loan, amounting to the said sum of twenty thousand dollars ($20,000), to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, and the said Fritz Augustus Heinze, whereby
36 the said sum of twenty thousand dollars ($20,000) then and there was wholly lost to said banking association and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

COUNT 7.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the fourteenth day of October, in the year nineteen hundred and seven, at the said Southern District of New York, one Fritz Augustus Heinze was the president of a certain banking association, a body corporate, then and there known and designated as The Mercantile National Bank of the city of New York, in the city of New York, in the county of New York, in the State of New York, which said banking association had been theretofore created, organized, and established, and was then existing and doing a banking business in the city of New York and county of New York in the district aforesaid under the laws of the United States; that he, said Fritz Augustus Heinze, so being president of said banking association as aforesaid, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said banking association, on said fourteenth day of October, in the year nineteen hundred and seven, then and there at said city of New York and county of New York and district aforesaid, unlawfully, knowingly, and fraudulently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there being to the amount and of the value of five hundred thousand dollars ($500,000) by unlawfully, knowingly, fraudulently,
37 and wilfully and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of said Fritz Augustus Heinze and of certain persons then and there doing

business under the firm name and style of Otto Heinze & Co., to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid, and to the use as aforesaid, unlawfully, knowingly, and fraudulently did then and there wilfully apply the said sum of five hundred thousand dollars ($500,000) of the moneys, funds, and credits of said banking association to the making of a certain demand loan for the said amount to himself, the said Fritz Augustus Heinze, and which said loan, when so made, as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place in this count of this indictment first aforesaid, the said Fritz Augustus Heinze did cause the proceeds of said loan, amounting to the said sum of five hundred thousand dollars ($500,000) to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Fritz Augustus Heinze, Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of five hundred thousand dollars ($500,000) then and there was wholly
38 lost to the said banking association and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

Count 7A.

The grand jurors aforesaid, upon their oath aforesaid, further present that they here repeat and herein incorporate, as if here set forth in full, each, every, and all of the allegations of count 1A of this indictment, down to and including the clause "that at all such times the aforesaid Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze were stockholders and said Arthur P. Heinze and Max H. Schultze were directors of the aforesaid The Mercantile National Bank of the City of New York;" in the paragraph of said count beginning "By virtue of their control as aforesaid over the management of the aforesaid United Copper Company."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the aforesaid Fritz Augustus Heinze, so being president of the aforesaid banking association, and by virtue of the official relation of said Fritz Augustus Heinze, as president of said banking association, on the fourteenth day of October, in the year nineteen hundred and seven, at the city and county of New York, in the Southern District of New York, unlawfully, knowingly, and fraudu-

lently, and with intent to injure and defraud said banking association and divers other persons to the grand jurors unknown, did wilfully misapply certain of the moneys, funds, and credits of said banking association then and there, being to the amount and of the value of five hundred thousand dollars ($500,000) by unlawfully, knowing, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of the said Fritz Augustus Heinze and of certain other persons then and there doing business under the firm name and style of Otto Heinze & Co., as aforesaid, to wit, Otto C. Heinze, Arthur P. Heinze, and Max H. Schultze, in the aforesaid scheme and plan to manipulate stock of the aforesaid United Copper Company as aforesaid, which said conversion and application of the said moneys, funds, and credits was then and there accomplished by said Fritz Augustus Heinze in the manner following, that is to say: By virtue of the power of management, control, and direction which the said Fritz Augustus Heinze, as president of the said banking association, then and there possessed over the moneys, funds, and credits of the same, the said Fritz Augustus Heinze, at the time and place aforesaid, with the intent aforesaid and to the use as aforesaid, unlawfully, knowingly, and fraudulently did, on the said fourteenth day of October, in the year nineteen hundred and seven, wilfully apply the said sum of five hundred thousand dollars ($500,000) of the moneys, funds, and credits of the said banking association to the making of a certain demand loan for the said amount to himself, the said Fritz Augustus Heinze, and which said loan, when so made as aforesaid, was not then and there well secured, and, in fact, not secured at all, all of which said facts he, the said Fritz Augustus Heinze, then and there well knew, and thereupon, to wit, at the time and place as aforesaid, the said Fritz Augustus Heinze did cause the proceeds of the said loan, amounting to the said sum of five hundred thousand dollars ($500,000) to be paid out of the moneys, funds, and credits of said banking association and applied and converted to the use and benefit of the said Fritz Augustus Heinze, and the said Arthur P. Heinze, Otto C. Heinze, and Max H. Schultze, whereby the said sum of five hundred thousand dollars ($500,000) then and there was wholly lost to said banking association and the moneys, funds, and credits of the same were and are depleted in that amount, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided.

HENRY A. WISE, *U. S. Attorney.*

(Endorsed:) U. S. Circuit Court. The United States of America vs. Fritz Augustus Heinze. Indictment. Under National Banking Laws, U. S. Rev. Stat., sec. 5209. Henry A. Wise, U. S. Attorney. A true bill. Evert S. Fink, foreman. U. S Circuit Court, Southern District N. Y. Filed Mar. 3, 1910. John A. Shields, clerk.

1910. Mch. 4. Deft. pleads not guilty with leave to withdraw.
Mch. 21. Filed order overruling demurrer.
Mch. 22. Deft. pleads not guilty.
Mch. 23. Filed order consolidating indictments. (Doc. 1–206, 2–119, 2–390.)
Mch. 25. Filed demurrer, nunc pro tunc as of Mch. 9, '10.
Apl. 25. Motion to quash granted as to counts one to seven, inclusive. Denied as to 1A to 7A, inclusive.
Apl. 26. Jury impaneled and sworn. Trial begun.
Apl. 27. Trial continued.
Apl. 29, May 2, 3, 4, 5, 6. Trial continued.
May 9. Counts one A, two A, three A, four A, five A, six A, and seven A dismissed.

41 *Order.*

At a stated term of the United States Circuit Court for the Southern District of New York, held at the United States court-house, in the post-office building, in the Borough of Manhattan, city of New York, on the 18th day of March, 1910.

Present: Hon. Walter C. Noyes, United States circuit judge.

UNITED STATES OF AMERICA
against
FRITZ AUGUSTUS HEINZE.

The defendant having, on the 9th day of March, 1910, filed his demurrer to the indictment filed herein at the January term, 1910, of this court; and said demurrer having come on for argument upon the issues of law raised thereby on the moton calendar of this court,

It is now, on motion of Mr. Henry A. Wise, United States district attorney; Messrs. Levy, Rosenthal & Heermance, the attorneys for the defendant consenting thereto,

Ordered that the said demurrer be and the same hereby is overruled without prejudice, however, to the defendant to raise and present at any trial under the indictment herein the questions of law raised by said demurrer.

And the entry of this order shall not be deemed as in any way prejudicing such questions or be taken as a judicial determination thereof.

WALTER C. NOYES,
United States Circuit Judge.

We hereby consent to the entry of the above order.

LEVY, ROSENTHAL & HEERMANCE,
Attys. for Defendant.

3/18/1910.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 21, 1910. John A. Shields, clerk.

42 *Order consolidating indictment.*

At a stated term of the Circuit Court of the United States held in and for the Southern District of New York, in the United States court-house and post-office building, in the borough of Manhattan, city of New York, on the 22nd day of March, nineteen hundred and ten.

Present, Honorable George C. Holt, U. S. judge.

THE UNITED STATES OF AMERICA
v.
FRITZ AUGUSTUS HEINZE.

Upon motion of Henry A. Wise, United States attorney for the Southern District of New York, attorney for plaintiff herein, to consolidate the indictment found against the above-named defendant, Fritz Augustus Heinze, on January 7, 1908, together with the indictment found against said defendant on May 11, 1909, and the indictment found against said defendant on March 3, 1910, and upon consent of John B. Stanchfield, esq., of counsel for said Fritz Augustus Heinze,

Ordered that the indictments aforesaid be and the same are hereby consolidated.

GEO. C. HOLT,
U. S. District Judge holding Circuit Court.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 23, 1910. John A. Shields, clerk.

43 *Demurrer.*

Circuit Court of the United States for the Southern District of New York.

THE UNITED STATES OF AMERICA
against
FRITZ AUGUSTUS HEINZE.

And now comes the defendant, Fritz Augustus Heinze, in his own proper person in the court, and, having heard read the indictment herein filed on the third day of March, 1910, demurs thereto and each and every count thereof upon the ground that the said indictment and each and every count thereof fails to charge against him, the said Fritz Augustus Heinze, any crime under the statute therein pleaded or otherwise, and this he is ready to verify.

And the said Fritz Augustus Heinze, for further grounds of demurrer, demurs to the said indictment and each and every count thereof for the following reasons:

First. That each and every count in the said indictment contained fails to charge the defendant in clear and unmistakable language with the crime therein sought to be charged against him, and

each and every count of the said indictment is void for uncertainty and ambiguity.

Second. That each and every count of the said indictment is void for repugnancy in that in each and every count it is asserted that he, the said Fritz Augustus Heinze, did commit the misapplication in each of the said counts severally charged by converting and applying the moneys, funds, and credits of the bank to the use of
44 the said persons in the said counts severally named, and in each of said counts it is later alleged that he "did cause" the proceeds of the loan in said counts severally referred to to be applied and converted and paid out to the persons therein severally named.

Third. That each and every of said counts in said indictment contained is void for repugnancy upon the further ground that while it is asserted that the defendant did misapply and convert the moneys, funds, and credits of the bank in each count mentioned by the method and means therein mentioned, the allegations of fact regarding the method and means of the alleged misapplication affirmatively show that there was no conversion.

Fourth. That each and every of said counts in said indictment contained is void for uncertainty and ambiguity in that while this defendant is charged with misapplying the moneys, funds, and credits of the bank, each and every of said counts fails to specify, respectively, what or how much in moneys, funds, or credits were misapplied.

Wherefore this defendant prays that the indictment and each and every count thereof may be dismissed.

LEVY, ROSENTHAL & HEERMANCE,
Attorneys for Defendant Fritz Augustus Heinze,
No. 2 Rector street, New York City.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 25, 1910. John A. Shields, clerk.

45 THE COURT (Hough, J., orally). Referring now only to the indictment of 1910, it appears to me that the present motion, which is, of course, to dismiss, renders it necessary to consider the matter somewhat more widely than would be proper upon demurrer only. That is to say, I believe by the weight of authorities a motion to quash is addressed largely to the discretion of the court, and if for any lawful reason it appears to be unjust, or not to the public benefit that the defendant should be put to his trial upon one or more counts, or upon the whole indictment, it is the duty of the court, of course, to quash the same.

Now, I will first very briefly express my views, and I hope I do it with becoming modesty, regarding the numbered counts of the indictment; that is, the numbered as distinct from the numbered and lettered counts of the most recent presentment. Now, undoubtedly, as I have held several times, and as has been held by many other inferior courts, the Evans case is ample authority for asserting that an allegation of intent is an allegation of fact, and that when duly made

it will help out other allegations of fact, which, standing by themselves, would be insufficient. But on the demurrer which was presented last year to the indictment of 1909, that argument was by the prosecuting officer pressed to its utmost, and it was then ad-
46 mitted and asserted by the gentleman representing the Government that if an indictment or a count in an indictment presented for the consideration of the court, and the jury a perfectly honest or a perfectly indifferent state of facts regarding any banking transaction, such as a loan or a discount or an overdraft, that it was enough to put the defendant to his trial to add to the statement of those indifferent facts out of which, standing by themselves, no criminality could be spelled, an allegation of intent to defraud. I do not deny that literally construed some of the language of the Supreme Court in the Evans case may be said to be capable of that result; but it seems to me so unjust, so dangerous to the citizen, that it ought not to be followed, or the argument ought not to meet with approval until doubt or denial is no longer possible, and I therefore upheld the motion to quash demurrer to most of the counts in the indictment of 1909.

Now, what is the difference between the numbered counts in the indictment of 1910 and the first fifteen counts of the indictment of 1909? From an examination of them which I recently made it appears, or would appear to me, that six out of the seven numbered counts in the indictment of 1910 there is exactly the same story as was contained in the corresponding number of counts in the indictment of 1909, with this difference: That the transaction which was said to have been evidenced by a demand note in 1909 is
47 called in 1910 a demand loan, and it is then asserted, after stating the same facts in substance as those set forth in 1909, that there was a conversion.

Now, it may be that under the language of Judge Putnam in the case cited in the First Circuit Court that if, speaking very loosely, the counts in the indictment had stopped there it might be good on demurrer. But I have not heard it doubted or denied that if an indictment of any other pleading goes beyond general words and alleges that which is special that the special words will control the general, so that, taking the whole story as told in the numbered counts of the 1910 indictment, I am unable to see that it differs from the corresponding statements of 1909, except that they have a label put on them and they are called "conversion." Now, there isn't any magic that I know of in that word, for, as matter of fact, the allegations set forth specially do not even prima facie amount to a conversion; calling them a conversion will not help the matter.

I put it to myself this way: Suppose that the Government proves exactly what is set forth in the numbered counts of the 1910 indictment, without anything else—not another word except the circumstances that are detailed in those counts—would it be lawful and, what is quite as important, would it be fair, would it be in-
48 tellectually honest to permit from those facts and nothing more a petit jury to imply or infer, first, a conversion, and, second,

an intent to defraud? It seems to me that the answer to both of those enquiries is emphatically no.

Now, construing these numbered counts of the 1910 indictment with the greater latitude which I believe that I am entitled to assume or exercise, since there is a motion to quash before the court, I don't think any lawyer of experience can read and compare these counts under the 1910 indictment, say 1 and 1A, for instance, without being compelled to believe that 1A specifically sets forth the prosecution's case, and that number 1 sets forth a very general form of words under which it is hoped that other proof may be admitted to help out the allegations of the indictment if the exact case made by 1A fails. Now, in my judgment, it is not wise, it is not for the advantage of the administration of criminal law that evidence should be speculated with in that manner, therefore, upon both grounds, because in my humble opinion, subject to instructions which I have previously said I hoped the lower courts will get on this subject of the national banking act from the highest tribunal, I believe that the numbered counts in the indictment of 1910 are demurrable, and, second, because it is my judgment that it is not advisable to permit both the numbered
49 and the lettered counts to go before the same jury, as matter of discretion I quash the counts of the 1910 indictment numbered from 1 to 7, inclusive.

Now, the lettered counts confessedly set forth the same transactions, as far as a note or a loan is concerned, as are told in the numbered counts, but those counts also show at great length and, in my judgment, with perfect clearness the existence and preexistence to the knowledge of the defendant of a speculative venture of the most hazardous nature, because the lettered count definitely asserts that the loan was made to persons who were interested with the defendant in that venture. Now, I have already tried to make to counsel, some of whom are here present, as plain as possible my own views as to the nature of the loaning of trust funds to an insolvent, and I have said and do believe that if such unsecured loans of trust funds be made to an insolvent voluntarily that that is prima facie a case of conversion, and I do not think that the Britton case sustains any opposite view, and if that conversion, if it be one, and is proven to be done with intent to defraud, it amounts to a crime.

Now, just as there is no magic in the word "conversion" there isn't any magic in my opinion in the word "insolvent," and any party handling trust funds who voluntarily parts with those trust
50 moneys to a hazardous and an immoral enterprise for the benefit only of others than the bank and to the loss of the bank, is also, in my judgment, prima facie guilty of conversion, and if that also be done with the intent to defraud and as denounced by the statutes the jury may find it to be a crime. Therefore I deny the motion to quash or otherwise dispose of now the lettered counts of the 1910 indictment.

51 *Order.*

United States Circuit Court, Southern District of New York.

UNITED STATES
against
FRITZ AUGUSTUS HEINZE.

The above entitled case having been duly called for trial at a criminal term of this court on the 25th day of April, 1910, and a motion having thereupon been made by the defendant to quash the indictment heretofore found on or about March 3rd, 1910, by the grand jury of the United States for the Southern District of New York, against the defendant, Fritz Augustus Heinze, for alleged violation of section 5209 of the Revised Statutes of the United States, and the said motion having come on to be heard on the said day, and after hearing counsel for the defendant in support of said motion and the district attorney of the United States for the Southern District of New York in opposition thereto, and the court, in the exercise of its discretion, having duly rendered an opinion in open court, and having, for the reasons stated in the said opinion, sustained the motion to quash counts numbered respectively 1, 2, 3, 4, 5, 6, and 7 of said indictment:

Now, on motion of Levy, Rosenthal & Heermance, attorneys for the defendant above named, it is

Ordered that the said counts, numbered respectively 1, 2, 3, 4, 5, 6, and 7, contained in the indictment of March 3rd, 1910, be, and the same hereby are, quashed, set aside, and declared null and void; and it is further

Ordered that the judgment of this court be entered in accordance herewith.

Dated New York, May 27, 1910.

C. H. HOUGH, *U. S. D. J.*

52 (Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed May 27, 1910. John A. Shields, clerk.

53 FRIDAY, *May 27, 1910.*

The court meets and is opened by proclamation.

Present: Hon. Charles M. Hough, judge.

THE UNITED STATES
vs.
FRITZ AUGUSTUS HEINZE.

It is hereby ordered that the counts numbered respectively 1, 2, 3, 4, 5, 6, 7, be, and the same hereby are, ordered quashed and declared null and void, and the same is the order of the court.

ASSIGNMENTS OF ERROR.

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF, plaintiff in error,
v.
FRITZ AUGUSTUS HEINZE, DEFENDANT.

Assignment of errors.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred in the decision of the court herein sustaining the motion to quash counts 1, 2, 3, 4, 5, and 6 of the indictment found herein on March 3rd, 1910:

I. The court erred in sustaining the motion to quash counts 1, 2, 3, 4, 5, and 6 of the said indictment;

II. The court erred in not overruling the motion to quash counts 1, 2, 3, 4, 5, and 6 of the said indictment;

III. The court erred in holding as a matter of law that counts 1, 2, 3, 4, 5, and 6 of said indictment were insufficient in law;

IV. The court erred in holding that counts 1, 2, 3, 4, 5, and 6 of said indictment did not set forth a crime under section 5209
55 of the Revised Statutes of the United States.

And the United States aforesaid, plaintiff-in-error, prays that the judgment entered herein sustaining the motion to quash said counts 1, 2, 3, 4, 5, and 6 of the said indictment for the errors aforesaid and other errors in the record and proceedings herein may be reversed and altogether held for nothing, and that the plaintiff-in-error may be restored to all things which it has lost by reason of said judgment, and that the Circuit Court of the United States for the Southern District of New York be directed to vacate and set aside said judgment and compel the defendant, the defendant-in-error, to plead to the said indictment.

Dated New York, May 27, 1910.

HENRY A. WISE,
United States Attorney in and for the Southern District of New York, Attorney for Plaintiff-in-Error.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed May 27, 1910. John A. Shields, clerk.

56 *By the honorable, , one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Fritz Augustus Heinze, greeting:*

You are hereby cited and admonished to be and appear before the Supreme Court of the United States of America, to be holden in

the city of Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the United States is appellant and you are appellee, and you are to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 27th day of May, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

C. M. HOUGH,

U. S. Judge holding a Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

57 (Indorsed:) U. S. Supreme Court. 390. The United State of America, E. & A. D. 3106. v. Fritz Augustus Heinze. (Original) Citation. Henry A. Wise, United States attorney, attorney for United States. Due service of a copy of the within is hereby admitted. Dated New York, May 27, 1910. Copy received. Levy, Rosenthal & Heermance. May 27, 1910. 2 Rector street, N. Y. Attorney for Fritz Augustus Heinze. U. S. Circuit Court, Southern District, N. Y. Filed May 28, 1910. John A. Shields, Clerk.

(Indorsement on cover:) File No. 22292. S. New York. C. C. U. S. Term No., 671. The United States, plaintiff in error, vs. Fritz Augustus Heinze. Filed August 9th, 1910. File No., 22292.

(Indorsed:) U. S. Supreme Court. United States, plaintiff in error, vs. Fritz Augustus Heinze, defendant in error. Office of the clerk. Received Aug. 9, 1910. Supreme Court U. S.

( )

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRITZ AUGUSTUS HEINZE. } No. 696.

MOTION TO ADVANCE.

The defendant in error, Fritz Augustus Heinze, president of the Mercantile National Bank of the city of New York, was indicted in the Circuit Court of the United States for the Southern District of New York on May 11, 1909, on a charge of intent to defraud the bank, for the benefit of himself and other persons, by causing the bank to discount single-name commercial paper, by reason of which the bank lost the amount of such discount, in violation of section 5209, Revised Statutes. A demurrer was filed and sustained by the court on the ground that the indictment did not charge conversion; that that word "supplied the legal measure, which the court has not been able to find in 'willful misapplication.'" In sustaining the demurrer the court said:

> It is much to be hoped that this decision will be reviewed; anything more unsatisfactory than the ruling cases on "willful misapplication" I have rarely met. (Rec., 29.)

The case is here under the criminal appeals act, in accordance with the provisions of which, that such cases shall have precedence, the Solicitor-General moves the court to advance the case for hearing on a day agreeable to the court at the next term.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 671.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRITZ AUGUSTUS HEINZE.

MOTION TO ADVANCE.

JOHN B. BRANCHEAU,
LOUIS S. LEVY,
A. B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 671.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRITZ AUGUSTUS HEINZE.

MOTION TO ADVANCE.

Now comes the defendant in error, by his counsel, and respectfully moves this honorable court that the above-entitled cause be advanced, to be heard with case No. 380 of present term, entitled The United States, plaintiff in error, *vs.* Fritz Augustus Heinze.

Case No. 380 involves a writ of error sued out by the United States to review the action of the trial court in sustaining demurrer to certain counts of an indictment returned against the defendant in error in 1909, charging violation of the National Banking Act in discounting certain notes while president of the Mercantile National Bank of New York.

Case No. 671 involves a writ of error sued out by the United States to review the action of the same trial court in quashing certain counts of a *subsequent* indictment returned against the defendant in 1910, for like alleged offenses, embracing in large part the same identical transactions made the subject-matter of the same charges in the former indictment. The identity of the two cases in this regard is clearly stated in the decision of the trial court, upon the later indictment involved in case No. 671, thus (R., 26):

> "Now, what is the difference between the numbered "counts in the indictment of 1910 and the first fif- "teen counts of the indictment of 1909? From an "examination of them which I recently made it ap- "pears, or would appear to me, that in six out of the "seven numbered counts in the indictment of 1910 "there is exactly the same story as was contained in "the corresponding number of counts in the indict- "ment of 1909, with this difference: That the trans- "action which was said to have been evidenced by "a demand note in 1909 is called in 1910 a demand "loan, and it is then asserted, after stating the same "facts in substance as those set forth in 1909, that "there was a conversion.
>
> "Now, it may be that under the language of Judge "Putnam in the case cited in the First Circuit Court "that if, speaking very loosely, the counts in the in- "dictment had stopped there it might be good on "demurrer. But I have not heard it doubted or de- "nied that if an indictment or any other pleading "goes beyond general words and alleges that which "is special, that the special words will control the "general; so that, taking the whole story as told in "the numbered counts of the 1910 indictment, I "am unable to see that it differs from the correspond- "ing statements of 1909, except that they have a "label put on them and they are called 'conversion.' "Now, there isn't any magic that I know of in that "word, for, as matter of fact, the allegations set forth "specially do not even *prima facie* amount to a con- "version; calling them a conversion will not help "the matter."

It is hence clear that these cases should be heard together, both as matter of convenience and saving of the valuable time of this honorable court as well as of plain justice to this defendant in error.

JOHN B. STANCHFIELD,
LOUIS S. LEVY,
A. B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FRITZ AUGUSTUS HEINZE. } No. 380.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on direct writ of error to the Circuit Court, under the Criminal Appeals Act, for review of the action of the Circuit Court in sustaining a demurrer to each of the first fifteen counts of an indictment against defendant in error for wilful misapplication of the assets of a national bank with intent to injure and defraud that bank, in violation of Revised Statutes, section 5209.

While the demurrer claims numerous other defects in the indictment (Rec., 23–28), the only question

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decided below (Rec., 29) and the only question that can be considered here (*United States* v. *Keitel*, 211 U. S., 370; *United States* v. *Stevenson*, 215 U. S., 190) is whether the statute of the United States denounces as a criminal offense such conduct as the several counts of the indictment allege.

The sixteenth count of the indictment (Rec., 22, 23) was sustained by the Circuit Court, and no question concerning that count is presented. The first fifteen counts (Rec., 2–21), to which the demurrer was upheld, all charge wrongful discounting of different notes by defendant in error, while president of the Mercantile National Bank of New York; and these fifteen counts vary only in the dates, amounts and personal names descriptive of the several transactions to which the counts relate and in the fact that the notes mentioned in counts one to nine, inclusive, and fourteen and fifteen were not at all secured, while the notes mentioned in counts ten to thirteen, inclusive, were not well secured. The aggregate of the unsecured notes is $1,362,000; and the insufficiently secured notes aggregate $370,000.

The details of each count may be exhibited from the first count. (Rec., 2–4.) It is alleged that Heinze, at the time of the unlawful discounting, was president of the Mercantile National Bank of New York, a national banking association organized and existing under the laws of the United States; that by virtue of such official position and his resultant control over the assets of the bank, Heinze "did

willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and divers other persons to the grand jurors aforesaid unknown, and without the knowledge and consent of the said national banking association, its board of directors and committees, and for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown, misapply certain of the moneys, funds, and credits of the said national banking association" by "willfully, wrongfully, unlawfully, and with intent to injure and defraud said national banking association and said divers other persons to the grand jurors aforesaid unknown" receiving and discounting with the moneys, funds and credits of the bank a promissory note made by a third person and otherwise properly described; that the discounted note was not "well secured, and in fact not secured at all," as Heinze well knew; and that the amount paid from the bank's funds in discounting the note "was wholly lost to the said national banking association." (Rec., 3.)

Revised Statutes, section 5209, reads:

> Every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of

> exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten.

The position of the Circuit Court is indicated by the following extract from its opinion:

> The crime of which defendant is guilty, if guilty at all, is "willful misapplication." The one characteristic, or essential of this crime, on which the Supreme Court has always insisted, is conversion; no method of being guilty without converting the money, funds, or credits of the bank has been pointed out. This word "conversion" has supplied the legal measure, which the court has not been able to find in "willful misapplication." If the facts stated in an indictment do not set forth a case of conversion, the indictment is bad, and a general allegation of wrongful intent will not cure it. Taking the first count, for example, could the bank have maintained an action for conversion against the recipient of

> the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts 1–15 are demurrable. (Rec., 29.)

The sixteenth count of the indictment was sustained by the Circuit Court, because the promissory note to which it relates was made to the bank by defendant in error himself, and because it is alleged in that count that Heinze was insolvent (Rec., 22, 29). In no other particulars does the sixteenth count differ from the other fifteen counts.

ASSIGNMENT OF ERRORS.

The Circuit Court for the Southern District of New York erred, separately as to each of the first fifteen counts of the indictment, in sustaining defendant in error's demurrer.

ARGUMENT.

The points to be made for the Government are:

I. No wrongful act or purpose on the part of any other person than the indicted bank officer or agent himself is essential to the offense of wilful misapplication of the bank's funds under Revised Statutes, section 5209; and the Circuit Court was wrong in holding that when the alleged offense consists in discounting a third party's note to the bank, it must appear that the third party, as well as the bank officer or agent who makes the discount, has been guilty of converting the bank's funds.

II. Certainly, the third person whose note is discounted and to whom the proceeds of the discount

are first paid need not be guilty, when the indictment alleges that the misapplication is made "for the use, benefit and advantage of" the bank officer and other persons.

III. The statute does not mention conversion at all; and no act of technical conversion by the bank officer or agent himself is necessary to the offense of wilful misapplication of the bank's funds unless the application of such funds by the bank officer or agent to the use or for the benefit of another than the bank, in violation of the official trust or agency and with an actual intent to defraud the bank, is necessarily also a conversion under the common law. The true nature of the offense is clear; and the question whether it also amounts to a conversion is really unimportant.

IV. Each of the fifteen counts of the indictment which the Circuit Court condemned charges every element of the statutory offense.

V. It is even true that, whether or not the statutory offense always involves a conversion of the bank's property by its unfaithful officer or agent, such conversion is shown by the indictment in this case.

All these propositions, beside being clear in principle, will be found well supported by the authority of this court.

I.

No wrongful act or purpose on the part of any other person than the indicted bank officer or agent himself is essential to the offense of wilful misapplication of the bank's funds under Revised Statutes, section 5209; and the Circuit Court was wrong in holding that when the alleged offense consists in discounting a third party's note to the bank it must appear that the third party as well as the bank officer or agent who makes the discount has been guilty of converting the bank's funds.

It is apparent that the sole ground of the decision of the circuit judge was that there must be a conversion by the party who receives the bank's funds through the improper discount, and that it is not enough (when the recipient of the proceeds of the discount is a third person) that the bank officer himself violates the statute. This is shown, first, by the direct language of the circuit judge. After stating that the facts alleged in the indictment must show a conversion (by somebody) and that a general allegation of wrongful intent is not enough, he at once puts this question: "Taking the first count, for example, could the bank have maintained an action for conversion against the recipient of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts 1 to 15 are demurrable." (Rec., 29.) That is, after declaring that a conversion by somebody is necessary, the circuit judge assumed that such conversion must be by the person who receives the bank's funds, and

that it is not enough if the bank officer alone converts those funds in paying them wrongfully to the third person. Further, the fact that the circuit judge sustained the sixteenth count evidences the same reasoning. That count differs from the first fifteen counts in no respect save that it is defendant Heinze's own note whose discounting by Heinze is attacked in that count and that this sixteenth count avers Heinze to have been insolvent, while the first fifteen counts do not allege the maker of the notes and receiver of the proceeds of the discount to have been insolvent. The omission of an allegation of insolvency in the first fifteen counts is, however, quite immaterial, and can not justify a different result as to the first fifteen counts and the sixteenth count. (*Evans* v. *United States*, 153 U. S., 584, 593.)

Allegation in general terms of a wilful misapplication by the bank officer and of such officer's actual intent to injure and defraud the bank is sufficient.

Evans v. *United States*, 153 U. S., 584, 593, 594.

United States v. *Corbett*, 215 U. S., 233, 243.

United States v. *Simmons*, 96 U. S., 360, 364.

The sole reason, therefore, for the Circuit Court's sustaining the sixteenth count, while it condemned the first fifteen counts, is that in the sixteenth count the discounted note was made and its proceeds were received by Heinze himself, while in the other fifteen counts the discounted note was made and its proceeds were received by third persons. The action

of the Circuit Court is accordingly fully met by controverting the proposition that the statute can not be violated, whatever the misconduct of the bank officer or agent, unless the third person whose note is discounted and to whom the proceeds of the discount are paid is himself also guilty of a conversion. That proposition is certainly unsound.

1. The language of section 5209 clearly looks to the acts and attitude of the bank officer or agent alone. It attaches no importance to the acts or the attitude of anybody else. It applies, in the first place, solely to bank officers and agents—not to outsiders. It is the bank officer or agent "who embezzles, abstracts, or willfully misapplies;" or "who, without authority from the directors, issues or puts in circulation any of the notes of the association;" or "who, without such authority, issues or puts forth any certificate of deposit," etc.; or "who makes any false entry" in the bank's books. In the second place, the intent to injure or defraud the bank or some one else or to deceive an officer of the bank or an agent appointed to examine its affairs is, under the terms of the statute, the bank officer's or agent's intent, and his alone. There is no warrant for anything else in the statutory phraseology.

2. The purpose of the statute is obviously to require and preserve the fidelity of those who stand in a relation of trust with the bank; and it is breach of the trust relation that the statute severely punishes. The motive of the enactment is found, on

its moral side, in the special turpitude of a fiduciary's infidelity to the party who trusts him and, on its practical side, in the high necessity and general adequacy, for the bank's protection, of faithfulness on the part of its officers and agents. Both reasons and purposes of the statute forbid the idea that punishment of a faithless bank officer or agent shall depend upon the guilt or innocence of an outsider. Morally, the officer or agent who violates his trust is certainly not less, and perhaps he is more, guilty when he stands alone in the guilt; practically, the statute falls to pieces if an officer or agent of the bank can dissipate its funds with impunity, however evil his own purposes, if no third person shares his guilty plans.

3. The idea of the Circuit Court, with reference to the case where a third person receives the proceeds of the discount of his own note, is that in such case there must always be "an aider or abettor" as well as a principal offender. That means that the statute does not seek to protect the bank against treacherous action of its own agents unless there is like treachery outside the bank. The very reverse is true. The statute does not punish outside chicanery unless there is infidelity of a bank officer or agent; and the only reason why outside chicanery is punished under the statute is that it induces or aids the bank officer's or agent's breach of his trust. Under the language of the statute this is clear; and this court has said:

> It is evident that no matter how active the cooperation of third persons may have been in

> the wrongful act of a bank officer or agent, such third person is required to be charged as an aider and abettor in the offense and prosecuted as such. The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons cooperating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender. In every criminal offense there must, of course, be a principal, and it follows that without the concurring act of an officer or agent of a bank, third persons can not commit a violation of the provisions of section 5209. If, therefore, a violation of the statute in question is committed by an officer and an outsider, the one must be prosecuted as the principal and the other as the aider and abettor. (*Coffin* v. *United States*, 162 U. S., 664, pp. 669, 670.)

4. It has frequently been declared that the statute reaches misapplication of the bank's funds to the use or for the benefit of others than the bank officer or agent himself.

In *United States* v. *Britton* (107 U. S., 655) it was said: "We think the wilful misapplication made an offense by this statute means a misapplication for the use, benefit, or gain of the party charged or of some company or person other than the association" (p. 666). This language was quoted with approval in *Evans* v. *United States*, *supra*, on page 587.

5. It is contrary to the general rule of criminal law and of morality that anybody should be held guilty

or innocent by any other test than his own acts and his own intent. Even the law of conspiracy furnishes no exception; because the specific purpose and arrangement for which a conspirator is punished are to cooperate with others in a common plan of illegality.

6. Certain decisions of this court, while not expressly treating the necessity of a supplementary conversion by the third person who receives the funds diverted from the bank, really contradict the position of the Circuit Court.

In the *Coffin* cases (156 U. S., 432, and 162 U. S., 664) Coffin was charged with having aided and abetted the president of the bank in misapplying funds to the use of the Indianapolis Cabinet Company and other third persons. Coffin, as aider and abettor, of course could not be convicted unless the president of the bank was guilty as a principal; and the question now under discussion was therefore as much involved in those cases as in the case at bar. The indictment neither showed nor attempted a showing of misconduct on the part of the Indianapolis Cabinet Company or the other third persons. (See counts in 156 U. S., pp. 434–439.) And this court paid no attention to the question whether the Indianapolis Cabinet Company or any other person for whose benefit the misapplication was made was guilty of misconduct in addition to the bank president's. The following is very pertinent:

> The various counts of the indictment here are all substantially alike in stating the conversion. We take the second as an example.

> That charges that Haughey, being president of the Indianapolis Bank, did then and there by virtue of his office as president of said bank unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of the bank, with intent to convert the same to the use of the Indianapolis Cabinet Company, by then and there causing said sum to be paid out of the moneys, funds, and credits of the bank upon a check drawn upon the bank by the Indianapolis Cabinet Company, which check was then and there cashed and paid out of the funds and credit of the bank, which sum, and no part thereof, was the said Indianapolis Cabinet Company entitled to withdraw from the bank, because said company had no funds in the bank, and that the said company was then and there insolvent, which Haughey then and there well knew, whereby said sum became lost to the bank. This clearly states the misapplication and actual conversion of the money by the methods described—that is to say, by paying it out of the funds of the bank to a designated person when that person was not entitled to take the funds, and that owing to the insolvency of such person the money was lost to the bank. The fact that the count charges the intent to convert money to the use of the Indianapolis Cabinet Company does not obliterate the clear statement of the actual conversion. (156 U. S., p. 450.)

Evidently the references to conversion meant a conversion by the bank president, not by the Indianapolis Cabinet Company. Equally, upon the re-

appearance of the case in 162 U. S., 664, no question was made whether the person to whose use the funds had been misapplied was guilty.

In *Putnam* v. *United States* (162 U. S., 687), where checks fraudulently drawn by Putnam as president of the Exeter Bank upon a deposit of that bank in another bank were made payable and were paid to a third person, no attention was paid to the guilt or innocence of that third person. On the contrary, the court deemed it sufficient to say that "the proceeds in no way inured to the benefit of the Exeter Bank." It said that, and only that, twice with reference to the different kinds of check involved (p. 709).

II.

Certainly the third person whose note is discounted and to whom the proceeds of the discount are first paid need not be guilty when the indictment alleges that the misapplication is made "for the use, benefit and advantage of" the bank officer and other persons.

This indictment does aver that the payment of the proceeds of the discount to the maker of the note was "for the use, benefit, and advantage of the said Fritz Augustus Heinze and other persons to the grand jurors aforesaid unknown." (Rec., 3.) Such allegation brings the present case certainly within the *Evans case* (153 U. S., 584). Evans was indicted for aiding and abetting the bank cashier in misapplying bank funds "for the use, benefit, and advantage of the said Nelson F. Evans" by fraudulently surrendering the note of one Nettleton, which the bank owned (pp.

585, 586). No misconduct on the part of Nettleton was averred or shown; and therefore this *Evans* case is another authority for Proposition I, unless the allegation that the transaction was for the use and benefit of Evans makes a difference; and, if that particular allegation does make a difference, it is also in the indictment at bar.

III.

The statute does not mention conversion at all; and no act of technical conversion by the bank officer or agent himself is necessary to the offense of wilful misapplication of the bank's funds unless the application of such funds by another than the bank, in violation of the official trust or agency and with an actual intent to defraud the bank, is necessarily also a conversion under the common law. The true nature of the offense is clear; and the question whether it also amounts to a conversion is really unimportant.

The view that a conversion, in the technical sense, is necessary to a wilful misapplication of the bank's funds has its origin in this statement of the *Britton* case (107 U. S., 655):

> We think the wilful misapplication made an offense by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of wilful misapplication, there must be a conversion to his own use or the use of someone else of the moneys and funds of the association by the party charged. This essential element of the offense is not averred

> in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds (pp. 666, 667).

The question then before the court was whether a purchase of the bank's own stock *for the bank itself* could be a misapplication of the bank's funds, when the indictment did not allege that through intentionally paying too much for the stock or otherwise the transaction was employed merely as a device for defrauding the bank. The point of the decision, therefore, was merely that there was no misapplication when the stock which was bought with the bank's funds went to the bank itself. The principle announced was that a wilful misapplication involves diversion of some of the bank's assets to somebody else than the bank—whether the faithless officer or an outsider. Nothing more was involved in the case, and the quoted language can not be taken to have meant more.

The statute itself enumerates the essential elements of the offense which it denounces. Those elements may perhaps be indicated as—

(*a*) Actual misapplication of bank assets, and that means a transfer of assets from the bank to

another which is beyond the true authority of the transferring bank officer or agent.

(*b*) A conscious disregard of his duty to the bank by its officer or agent in making the transfer.

(*c*) An intent on the part of the bank officer or agent who makes the transfer to injure or defraud the bank or somebody else.

If these things coexist, the statute says that the offense is committed. It may be that these things always and inevitably involve a technical conversion; but that may not be the invariable result, and it is quite unimportant whether the stated elements show a technical conversion or not. If they do, the conversion is not the cause but a concomitant of the criminal offense. The enumerated essentials do not constitute a crime for the reason that they happen to show a conversion, but because the statute directly makes them a crime, without reference to their common law quality. If, on the other hand, the stated elements fail in any case to show a conversion, still they constitute a "wilful misapplication" within the statute. Reference to the doctrine of conversion can not properly be made as a test of the statute's reach, but merely affords an analogy. The statute does not alter or fail if in conceivable circumstances the analogy may fail.

The truth is, apparently, that this court has never said that the facts alleged in support of an indictment for wilful misapplication must invariably show a technical conversion—such as would ground an action of trover at common law. Such statements

as have been made that assets of the bank must be "converted" to the use of the misbehaving bank officer or agent or of some one else were employed to indicate that the bank assets must have been diverted from the bank to the use or for the benefit of another.

The offense under the statute is well described in the following language, of which the first paragraph was a charge of the trial court in the *Coffin* case and the second paragraph is a statement of Mr. Justice White:

> "If Haughey and the defendants withdrew moneys from the bank for the use of the cabinet company by means of checks drawn by it on said bank when it had no funds or moneys on deposit against which to draw, if they acted in good faith, honestly believing that the cabinet company would be able to repay the same when required, they would not be guilty of the intent to defraud the bank as charged; but, on the other hand, if they acted in bad faith, and did not believe, and had no reasonable ground to believe, that the cabinet company could repay such overdrafts when required to do so, then they had no lawful right to make such overdrafts or allow them to be made."
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> * * * * *
>
> "It can not be disputed that a bank president not acting in good faith has no right to permit overdrafts when he does not believe and has no reasonable ground to believe that the moneys can be repaid. And if, coupled with such wrongful act, the proof establishes

> that he intended by the transaction to injure and defraud the bank, the wrongful act becomes a crime." (162 U. S., pp. 682, 683.)

In the *Evans* case (153 U. S., 584) defendant was indicted in some of the counts for aiding and abetting the bank cashier to wilfully misapply funds of the bank through improper discounts. Guilt on the part of Evans was therefore necessary, beside guilt of the cashier. These discount counts are treated on pages 591–594. So far as the language calls for guilty conduct by Evans as well as the bank cashier, it is explained by the fact that Evans was himself accused. The following quotation bears well upon the nature of the statutory offense:

> It is objected, however, to this count that there was no averment that the cashier, in discounting the note, acted in excess of his powers or outside of his regular duties, nor was there any averment that the cashier was not the duly authorized officer of the bank to discount paper, nor was there any averment that the discount was procured by any fraudulent means, or that Evans was at the time of such discount insolvent or knew himself to be so. It was held by this court in *Bank of the United States* v. *Dunn* (6 Pet., 51) that the power to discount paper was not one of the implied powers of the cashier, and this is believed to be the law at the present day. (Morse on banking, sec. 117.) If the directors of this bank had authorized their cashier, either generally or in this particular case, to discount paper, it was clearly matter of defense. But

even if he did possess such power and willfully abused it by discounting notes which he knew to be worthless, and did this with deliberate intent to defraud the bank, it is not perceived that his criminality is any less than it would have been if he had acted beyond the scope of his authority.

No averment was necessary that such discount was procured by fraudulent means, since the offense consists not in the use of fraudulent means, but in the discount of a note which both parties knew to be unsecured, with the intent thereby to defraud the bank. An averment that Evans was at the time insolvent, or knew himself to be so, was also unnecessary, in view of the allegation that Evans knew that the note was not secured and procured the same to be discounted with intent to defraud the bank. The argument of the defendant in this connection assumes that under no circumstances is the discount of a note, which all parties know to be worthless, an offense under the statute, even though such discount be made for the deliberate purpose of defrauding the bank out of the proceeds of the note so discounted. We do not see how it is possible to give such an interpretation to the statute without a practical nullification of its provisions (pp. 592, 593).

The offense is also well analyzed in *United States* v. *Fish* (24 Fed., 585).

Possession of the misapplied funds by the offending agent of the bank is not requisite. (*United States* v. *Northway*, 120 U. S., 327.)

While they have no pertinence to the present case, other decisions of this court concerning indictments for wilful misapplication are here cited:

Claasen v. *United States*, 142 U. S., 140.
Batchelor v. *United States*, 156 U. S., 426.
Agnew v. *United States*, 165 U. S., 36.

IV.

Each of the fifteen counts of the indictment which the Circuit Court condemned charges every element of the statutory offense.

1. It was not necessary to allege that the maker of the discounted note was insolvent. (*Evans* v. *United States*, 153 U. S., 584, 593.)

Defendant misapplied the bank's funds if he paid them out in discounting notes which he believed would not be paid; and he might so believe, even if the maker of the notes was solvent, in case he thought that insolvency would supervene later or that the maker would abscond or for some other reason fail to pay.

General allegation of the wilfulness of the misapplication and of the bank officer's intent to injure or defraud is enough.

Evans v. *United States*, 153 U. S., 584, 593, 594.
United States v. *Corbett*, 215 U. S., 233, 243.
United States v. *Simmons*, 96 U. S., 360, 364.

2. The misapplication need not be for the use or benefit of defendant himself.

United States v. *Britton*, 107 U. S., 665, 669.
Coffin v. *United States*, 156 U. S., 432, and 162 U. S., 664.

But, as already stated, this indictment does allege the application to have been for Heinze's own use and benefit. (Rec., 3.)

3. Actual loss to the bank is unnecessary. It is enough that the transaction was unauthorized and had an evil purpose when it occurred, though the bank finally receives payment.

United States v. *Evans*, 153 U. S., 591.
United States v. *Morse*, 161 Fed., 429, 435.

But this indictment in fact alleges that the misapplied funds were lost to the bank (Rec. 3).

4. The count upheld in *Coffin* v. *United States* (156 U. S., 432, pp. 449–451) is exact precedent for the present indictment, and rules the present case, whether or not the acts charged against Heinze show a technical conversion.

The only difference between the just-mentioned count of the Coffin indictment and the present indictment is that the former alleged the person whose note was discounted to have been insolvent; and that difference is immaterial. Notwithstanding his insolvency, the person whose note was discounted in the *Coffin* case might not have believed himself insolvent or might have honestly and reasonably expected a betterment of his affairs. That person's insolvency therefore did not necessarily involve misconduct on his part. On the other hand, in this case, even if the makers of the notes which Heinze discounted were solvent, still Heinze may have believed (and the

general allegations of his bad intent are sufficient to establish his belief) either that the makers of the notes were insolvent or that they would become so before payment of the notes or that they would decamp with their property or that for some other reason the notes would not be repaid to the bank.

5. *United States* v. *Britton* (108 U. S., 193) involves no difficulty, either for this case or for the general legal theory.

Only the treatment of the first count (pp. 193, 194), on pages 196 and 197, needs consideration. Defendant was there charged as president of a national bank with "causing and procuring" his own note, indorsed by a person whom he knew to be insolvent, to be discounted by his bank for his own benefit. No other fact, except defendant's own known insolvency, was alleged. Particularly, it was not charged that defendant himself discounted his note. Of this the court said:

> On the contrary, the charge is that he caused and procured it to be discounted. This implies that it was done by the directors or other duly authorized officers or agents. It is not alleged that the discount was procured by any fraudulent means. From all that appears, the board of directors, or the officer or agent by whom the note was discounted, may, upon knowledge of all the facts, in the utmost good faith and for the advantage of the association, have decided to discount the note (p. 197).

That is—defendant Britton was not shown either to have made the discount himself or to have induced the action of the discounting officers or agents by any misrepresentation. It may be added that Britton was not alleged to have been without a reasonable hope and purpose of paying his discounted note.

Further, the indictment charged no facts that would show guilt on the part of the directors or other agents who discounted Britton's note; and therefore Britton could not be held even for aiding and abetting the discount. It was not alleged that the directors or other discounting agent knew the insolvency of Britton or his indorser; and, even if they did know it, there was no allegation that they had willfully misapplied or that they had intended to injure or defraud the bank. On the contrary, they might still have thought that defendant would become able to pay, or might have had some other of the many possible reasons for making the discount in honest regard for the bank's welfare.

V.

It is even true that, whether or not the statutory offense always involves a conversion of the banks property by its unfaithful officer or agent, such conversion is shown by the indictment in this case.

The action of Heinze, upon the allegations of the indictment, was beyond his authority as an officer of the bank, and indeed in deliberate disregard of his official duty, and was an interference with the dominion of the bank over its own property. The

wrongfulness of the action is sufficiently covered by this already-quoted statement in the *Coffin* opinion:

> It can not be disputed that a bank president not acting in good faith has no right to permit overdrafts when he does not believe and has no reasonable ground to believe that the moneys can be repaid. (162 U. S., p. 683.)

And the wrongful transfer of the bank's assets was more than a trespass, for it was made in the purpose of altering ownership; and, indeed—if the transferee was innocent—actually passed the title.

Where an agent, having an agreed control over a principal's property, handles the property in disregard of his authority for the benefit of another than the principal, he is guilty of conversion. (*Vasse* v. *Smith*, 6 Cranch., 226.)

Likewise, if, in disregard of his authority, an agent undertakes to give title to a third person, there is a conversion; and the transferee is also guilty of conversion if he knows the breach of agency.

> *Kitchen* v. *Bedford*, 13 Wall., 413.
> *White* v. *Wall*, 40 Me., 574.

Generally an agent of limited authority who interferes with or disposes of his principal's property "beyond the extent of the authority conferred, with intent so to apply and dispose of it as to alter its condition or to interfere with the owner's dominion," converts that property. (*Laverty* v. *Snethen*, 68 N. Y., 522, 524.)

It is not necessary that the indictment allege conversion in so many words.

Evans v. *United States*, 153 U. S., 584.
Coffin v. *United States*, 156 U. S., 432, 449.
United States v. *Fish*, 24 Fed., 585.
Rieger v. *United States*, 107 Fed., 916, 926, 927.
United States v. *Morse*, 161 Fed., 429, 432.

LLOYD W. BOWERS,
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